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No. _____

In the Supreme Court of the United States

October Term, 1987

THEEE MOVIES OF TARZANA,

Petitioner,

v.

PACIFIC THEATRES, INC., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROTHERS DISTRIBUTING CORPORATION and MGM/UA ENTERTAINMENT CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
CHRISTOPHER LAYNE
611 West Sixth Street
28th Floor
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioner
THEEE MOVIES OF TARZANA

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED FOR REVIEW

What is the appropriate standard for granting summary judgment in a rule of reason antitrust action? Specifically, this petition involves a case where a genuine issue was raised as to the reasonableness of a clearance requested by a first-run motion picture exhibitor over a primarily subrun theater. By requesting the clearance, which was granted, the first-run exhibitor thereby induced motion picture distributors to boycott the subrun theater. Evidence was presented below that respondents' actions restricted output and reduced price competition. The precise issue this petition raises is whether the balancing of the clearance's procompetitive and anticompetitive effects required by the rule of reason should have been undertaken by the trial court or left to the jury.

LIST OF PARTIES

Petitioner Theee Movies of Tarzana ("TMT") was a partnership doing business under the fictitious name "Theee Movies of Tarzana." TMT was, until the sale of its assets in late 1982, engaged in the exhibition of motion pictures at a six-screen theater in Tarzana, California.

Petitioner Pacific Theatres, Inc. ("Pacific") is a California corporation engaged in the business of exhibiting motion pictures. Pacific operates a large chain of theaters in Southern California, including since about December 1980, a four-screen theater called the Pacific Galleria ("the Galleria"). The Galleria is located in the Sherman Oaks Galleria shopping center in Sherman Oaks, California.

Respondents Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Warner Brothers Distributing Corporation, and MGM/UA Entertainment Co. (collectively, "the distributors") are engaged in the production, distribution and licensing of films throughout the United States, including the San Fernando Valley area of metropolitan Los Angeles. Each of the distributors maintains a sales office or exchange in the Los Angeles area for the purpose of licensing its films to exhibitors.

TABLE OF CONTENTS

Page

Questions Presented For Review i

List Of Parties i

Table Of Authorities iv

Opinions Below 1

Jurisdictional Statement 2

Constitutional And Statutory Provisions Involved 2

Statement Of The Case 2

A. Jurisdiction and Timeliness of Appeal 2
B. Statement of Facts 2
   1. Background 2
   2. The Proceedings Below 6

Reasons For Granting The Writ 8

A. Introduction 8
B. By Themselves Performing the Rule of Reason Balancing Test, the Courts Below Improperly Displaced the Jury from Its Rightful Function 11
C. Factual Issues Were Raised Concerning the Clearance's Anticompetitive Impact 14
   a. The Clearance Adversely Affected Both Consumer Choice And Price Competition 18
   b. The Clearance Was Unreasonably Restrictive As Evidenced by the Galleria's Policy of Playing Day and Date with MVW 19

Conclusion 20

Appendix A A1

Appendix B B1

TABLE OF AUTHORITIES CITED

Cases **Page**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 9
Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466 (1982) 16
Barnes v. Arden Mayfair, Inc., 759 F.2d 676 (9th Cir. 1985) 10
Barry v. Blue Cross of California, 805 F.2d 866 (9th Cir. 1986) 10
Beltz Travel Service, Inc. v. International Air Transport Association, 620 F.2d 1360 (9th Cir. 1980) 15
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 17, 20
Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203 (9th Cir. 1982) 15, 17, 20
Braxton-Secret v. A.H. Robins Co., 769 F.2d 528 (9th Cir. 1985) 14
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551 (1979) 21
Brunswick Corp. v. Vineberg, 370 F.2d 605 (5th Cir. 1967) 10
Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366 (9th Cir. 1983) 13, 16
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 8, 9, 21
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977) 16
F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009 (1986) 21

Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied,* 345 U.S. 964 (1953) 13
Fruehauf Corp. v. Royal Exchange Assurance of America, Inc., 704 F.2d 1168 (9th Cir. 1983) 14
Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981), *cert. denied,* 454 U.S. 1145 (1982)..... 14
International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401 (9th Cir. 1985)..... 14
Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976), *cert. denied,* 431 U.S. 938 (1977)..... 15
Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979), *cert. denied,* 447 U.S. 924 (1980) 16
Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom.* National Football League v. Oakland Raiders, Ltd., 469 U.S. 990 (1984) 17, 20
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986) 8, 9, 21
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464 (1984)..... 8
National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir.), *cert. dismissed sub nom.* Los Angeles Memorial Coliseum v. National Basketball Association, 56 U.S.L.W. 3401 (U.S. Nov. 23, 1987) (No. 87-376)..... 10
National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355 (1978) 16
Naumkeag Theatres Co. v. New England Theatres, Inc., 345 F.2d 910 (1st Cir.), *cert. denied,* 382 U.S. 906 (1965)..... 13

Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770 (D.D.C. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959)..... 20
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486 (1962)..... 10, 11
Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Securities Co., 751 F.2d 1262 (D.C. Cir. 1985)..... 14
Quad Cinema Corp. v. Twentieth Century-Fox Film Corp., 1983-1 Trade Cas. (CCH) ¶ 65,381 (S.D.N.Y. 1983)..... 17
R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 827 F.2d 407 (9th Cir. 1987)..... 10, 11, 17, 18, 21
Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030 (9th Cir. 1983)..... 14
Richards v. Nielsen Freight Lines, 602 F. Supp. 1224 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987)..... 14
Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981)..... 10, 11, 21
Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), *cert. denied sub nom.* Motown Record Corp. v. Solinger, 441 U.S. 908 (1979)..... 15
Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 876 (1987)..... 17
United States v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955)..... 12-13
United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915 (1948)..... 15, 18

Statutes

15 United States Code
§ 1 ..... 2, 6, 8
§ 15 ..... 2, 6
28 United States Code
§ 1254(i) 2
§ 1291 2
§ 2107 2

Rules

Federal Rules of Appellate Procedure
Rule 4(c) 2
Federal Rules of Civil Procedure
Rule 56 ..... 2, 8, 9, 10, 21

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 1395 (9th Cir. 1987) and appears as Appendix A, pp. A1-A12. The opinion of the District Court granting summary judgment against TMT published at 1986-2 Trade Cas. (CCH) ¶ 67,231, at 61,170 (C.D. Cal. 1986) and appears as Appendix B, pp. B1-B10.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 28, 1987. TMT did not file a petition for rehearing. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal
>
> . . . .

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness of Appeal.

TMT appealed from a decision of the United States District Court for the Central District of California granting summary judgment for respondents pursuant to Rule 56, Fed. R. Civ. P. The trial court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. § 15.

The Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the district court's decision pursuant to 28 U.S.C. § 1291. On July 28, 1986, TMT timely filed its notice of appeal pursuant to 28 U.S.C. § 2107 and Rule 4(c), Fed. R. App. P. The Ninth Circuit affirmed the district court.

B. Statement of Facts.

1. Background.

This petition concerns the licensing and exhibiting of motion pictures. Motion picture theaters ("exhibitors")

compete with each other for the patronage of moviegoers and for the right to license from film distributors motion pictures for exhibition. Distributors license films for exhibition ("runs") on a geographic basis. A "run" is the continuous exhibition of a motion picture in a defined geographic area for a specific period of time. Within a defined geographic distribution zone, films may be licensed exclusively to one theater ("an exclusive run") or to two or more theaters (a "non-exclusive run" or "multiple run"). When a film is licensed to run simultaneously at two or more theaters in a defined geographic zone, it is said to be playing "day and date" at those theaters.

When seeking the right to exhibit a film, exhibitors frequently request from the distributor a "clearance" over competing theaters for a specific period of time. A clearance obligates the distributor not to license the film to cleared theaters. A clearance therefore prevents a cleared theater from competing against the licensed exhibitor by playing the film day and date.

Prior to selling its assets to Mann Theaters in late 1982, TMT operated a six-screen theater on Ventura Boulevard in Tarzana, California. Although TMT exhibited a limited number of films on a first-run basis, invariably these were marginal first-run films with low box office ("grossing") potential. (CR 89:191-92.) Essentially TMT was considered in the industry to be a "subrun house." (CR 89:162, 191-92; CR 90:464, 471.) A subrun theater exhibits films after they have completed their first-run at another theater (a "moveover" occurs when a film completes its first-run and goes to a subrun theater). TMT's subrun admission prices were lower than those charged by the first-run Galleria theater and by West Valley first-run theaters. (CR 98, Exhibit C.) TMT

was a profitable business through 1981; however, in 1982, its box office gross declined precipitously. (CR 98, Exhibit A.) In 1982 Mann acquired TMT and renamed the theater Mann's Valley West ("MVW"). The record below reflects that Mann spent some $658,000 remodeling the theater.

For the purposes of licensing motion pictures for exhibition, film distributors historically had divided the San Fernando Valley into distinct and separate East and West Valley zones; the San Diego Freeway was the dividing line. (CR 89:135; CR 98:11, 20, 22, 38-39, 42.) As a general rule, theaters were considered to be in substantial competition only with theaters in their own part of the valley; thus West Valley theaters were not considered to be in substantial competition with East Valley theaters (and *vice versa*). (CR 98:11, 20, 42-43.) The East Valley/West Valley zoning continued in effect until Pacific's Sherman Oaks Galleria theater opened in late 1980. (CR 89:43-44.) The Galleria theater is located just east of the San Diego Freeway; TMT was located in Tarzana, approximately four miles west of the San Diego Freeway. When the Galleria opened, Pacific began requesting clearance over TMT on all films played by the Galleria. Pacific's clearance request was granted by the distributors, none of which questioned or resisted its scope or duration. (CR 98:21, 23-24, 50-51.)

The majority of subrun films exhibited by TMT had their first-run at one of the three Woodland Hills theaters: the Warner Center (United Artists), the Woodland Hills (General Cinema Corporation), and the Topanga Twin (Pacific). (CR 93:1-2.) However, TMT's

access to subrun film product changed dramatically for the worse when the Galleria opened its doors. (CR 89:45-47; CR 98:9-10.) The Galleria often played first-runs day and date with the Woodland Hills theaters. (CR 89:45-47.) The Galleria extended its first-run playtimes beyond those of the Woodland Hills first-run theaters and cleared TMT. This prevented TMT from subrun exhibition of films that had *completed* their Woodland Hills first-run but which continued to play "first-run" at the Galleria. (CR 89:45-47; CR 93:2; CR 98:18.) By this practice, Pacific prevented TMT from licensing as "subruns" films that terminated their Woodland Hills first-run as it had done before the Galleria's opening. As a direct result of the Galleria's extended first-run and clearance, TMT was precluded from licensing films—including many large grossing films—which it would have exhibited as subrun "but for" the Galleria's blanket clearance over it. (CR 98:1-2.)

In 1981 TMT's film buyer initiated a meeting with Pacific's representatives to discuss the adverse impact of the Galleria's clearance on TMT and to request that Pacific lift or modify the clearance. (CR 93:2; CR 98:9-10.) Pacific rebuffed TMT's entreaties. (CR 93:2-3.) As a result of the Galleria's clearance, TMT began to experience serious financial difficulties. (CR 93:3.) As its financial picture darkened, TMT made a second attempt to persuade Pacific to lift the Galleria clearance. In June 1982, TMT's attorney wrote Pacific describing the anticompetitive impact of the Galleria's clearance and asking that it be lifted or modified. (CR 93:2-3.) Once again, Pacific refused to lift the Galleria's clearance over TMT. (CR 93:3.)

Ultimately, as a result of Pacific's refusal to modify or withdraw the Galleria clearance, TMT was unable

to secure subrun film product with sufficient grossing potential to fill all of TMT's six screens on a weekly basis. (*Id.*) It became apparent to TMT's managing partner that TMT was headed for insolvency and that the only viable option was to sell. (*Id.*) TMT's assets were sold at a distress price to Mann in October 1982. After renovation (see above at p. 4) Mann reopened the theater in December 1982.

Since mid-1984, the Galleria and MVW have played day and date on a regular basis. During this period, both theaters have enjoyed a steady increase in box office revenues. In 1983 the Galleria's gross box office receipts were $1,892,982 and these increased in 1984 to $1,964,459. MVW's 1983 gross box office receipts were $1,849,535 and these increased in 1984 to $2,368,510. (CR 98, Exhibit A.) MVW is now considered a separate run; thus there are now three Valley runs playing day and date. (CR 98:58-60.) With the exception of MVW (and theaters which are no longer in business) the Galleria's clearance patterns have remained essentially unchanged both before and after Mann's acquisition of TMT. (CR 98:33.)

2. The Proceedings Below.

On July 2, 1984, TMT commenced this action below to recover damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for respondents' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. (CR 1.) In its complaint petitioner alleged, *inter alia*, that by granting the Galleria's clearance over TMT, respondents unreasonably refused to permit TMT to exhibit motion pictures simultaneously with the Pacific Sherman Oaks Galleria theater. TMT further alleged that this unreasonable use of clearances was designed to restrain trade and commerce in the distribution and licensing

of motion pictures by discriminating against independent theaters like TMT (which often charge lower admission prices than first-run theaters owned by the major theater circuits). As a result of respondents' course of conduct: consumer choice and price competition in the exhibition of films were adversely affected; TMT suffered competitive injury to its business and property (lost box office revenues); and the resulting economic distress forced TMT to sell its assets to Mann at a price well below their true value.

On April 14, 1986, Pacific moved for summary judgment. (CR 86.) Pacific's motion reduced the lawsuit to a single issue: Were TMT and the Galleria substantially competitive with one another? If so, the Galleria's clearance over TMT was perforce reasonable as a matter of law. (CR 85:1.) Pacific's motion hinged on the almost purely factual argument that because of demographical factors TMT and the Galleria were in substantial competition:

> The two theatres were less than 5 miles apart on the same, easily traveled major thoroughfare—Ventura Boulevard. The theatres were about 13 minutes away from each other for potential patrons driving at the posted speed limit—even less if the Ventura Freeway was used. No rivers, mountains, industrial parks, airports, railroad yards or other barriers stood in the way of someone wanting to see a film at the Galleria or plaintiff's theatre. The San Diego Freeway is not the Berlin Wall. There is absolutely no evidence in the record to support a finding the two theatres did not draw patronage from the same geographical area.

(CR 85:2.)

Pacific's summary judgment motion was heard by the trial court on May 19, 1986, and on July 28, 1986, the district court entered judgment in Pacific's favor. (CR 121.) The trial court explained its decision in a memorandum granting respondents' motions for summary judgment. (CR 120.) The trial court concluded that TMT and the Galleria were in substantial competition and that the Galleria's clearances were reasonable. (CR 120:11.)

REASONS FOR GRANTING THE WRIT

A. Introduction.

In recent years this Court has had occasion to consider and more sharply delineate the criteria for granting summary judgment pursuant to Rule 56, Fed. R. Civ. P.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), the Court addressed the standard for summary judgment in antitrust conspiracy cases where the factual context suggests plaintiff's claim is implausible. The Court held that "[t]o survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 588, 106 S. Ct. at 1357 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 1471 (1984)).

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), the Court held that on a motion for summary judgment, Rule 56 requires the nonmoving party to go beyond the pleadings and adduce specific facts that demonstrate the existence of a genuine issue

for trial. *Id.* at 2553. The Court also stressed that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 2555 (citations omitted).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), the Court stated that the inquiry performed on a motion for summary judgment is the threshold analysis of "determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 2511. The Court went on to say that summary judgment is not proper "[i]f reasonable minds could differ as to the import of the evidence" and stressed that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.*

Read together, *Matsushita, Celotex,* and *Anderson* underscore the tension between the conflicting policy objectives that underlie Rule 56. On the one hand, *Matsushita* and *Celotex*, which emphasize the nonmoving party's burdens, reflect sound considerations of judicial administration and economy: summary judgment is a tool "to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 106 S. Ct. at 2553. On the other hand, as *Anderson* suggests, in considering summary judgment motions, courts must be careful not to usurp the jury's function and thereby abridge the nonmoving party's right to a jury trial. As

the court stated in *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967), "[s]ummary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use."

The difficulty of reconciling these competing policy imperatives can be especially acute in rule of reason antitrust cases. The balancing inquiry mandated by the rule of reason is factually intensive. Moreover, several Ninth Circuit decisions have stated that for this reason, courts are "particularly reluctant" to grant summary judgment in rule of reason cases. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407, 422 (9th Cir. 1987); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1388 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981). *R.C. Dick* and *Ron Tonkin* echo the holding in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962), that summary judgment is to be granted sparingly in antitrust cases. After an apparent eclipse, *Poller* has once again found favor with the Ninth Circuit. *See National Basketball Association v. SDC Basketball Club, Inc.*, 815 F.2d 562, 567 (9th Cir.), *cert. dismissed sub nom. Los Angeles Memorial Coliseum v. National Basketball Association*, 56 U.S.L.W. 3401 (U.S. Nov. 23, 1987) (No. 87-376). Yet, there is no clear consensus within the Ninth Circuit about *Poller* or its specific extension to rule of reason cases. *See, e.g., Barry v. Blue Cross of California*, 805 F.2d 866, 871 (9th Cir. 1986), where the Ninth Circuit, quoting *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985), stated that *Poller's* language "merely teaches caution" and affirmed the grant of summary judgment in a rule of reason case.

The confusion that surrounds the application of Rule 56 in antitrust cases is illustrated in the instant petition.

In a rule of reason case where genuine issues of material fact were in dispute, summary judgment was nonetheless granted against TMT. Both the district court below and the Ninth Circuit ignored the cautionary injunctions of *Poller, R.C. Dick* and *Ron Tonkin*: rather than deferring to the jury, the courts below themselves proceeded to undertake the balancing test mandated by the rule of reason. The decisions below reflect the state of confusion in this area of the law. Petitioner TMT respectfully submits that by granting this petition for a writ of certiorari, this Court could refine the guidelines for summary judgment in rule of reason antitrust cases and alleviate the confusion on this score that now besets the lower courts.

B. By Themselves Performing the Rule of Reason Balancing Test, the Courts Below Improperly Displaced the Jury from Its Rightful Function.

Although the district court purported to conclude that there were no genuine issues of material fact, it is apparent from reading the court's memorandum opinion that, in reality, genuine issues of material fact were in dispute. The district court, however, granted summary judgment for respondents because the court itself weighed the disputed facts and contradictory inferences and concluded that the Galleria's clearance over TMT was not an unreasonable restraint on competition.

The district court found the following facts: (1) The Galleria and TMT were both located on Ventura Boulevard in the San Fernando Valley; (2) The Galleria and TMT were located approximately four and one half miles apart; (3) The Galleria and TMT were easily accessible to the West San Fernando Valley moviegoing public; (4) TMT was basically a subrun theater; (5)

TMT's subrun admission prices were lower than the Galleria's admission prices for first-run films; (6) In terms of its amenities, TMT was not a first-run theater; (7) In terms of amenities, the Galleria was a state of the art first-run theater; (8) TMT and the Galleria occasionally bid against each other for the right to exhibit first-run films; and (9) The Galleria exercised a clearance over TMT. (Appendix B at B2-B3.)

On that basis and without any serious discussion of the procompetitive and anticompetitive effects of the Galleria's clearance over TMT, the district court concluded:

> The evidence reveals that the TMT and Galleria theatres were located near enough to one another to draw patrons from the same surrounding communities; no barriers prevented patrons from travelling to one or to the other; both were located on the same major thoroughfare, Ventura Boulevard; both competed with one another and other theatres for the rights to screen first run films although TMT's bids reflect that it was less intent on showing first run films as [sic] were the other first run theatres; occasionally, TMT did screen first run films and charged admission prices equivalent to those charged by the Galleria.
>
> As defendants have shown, the issue of reasonableness and, hence, the legality of the clearances, is premised upon a showing that the theatres were in substantial competition. *United States v. Paramount Pictures, Inc.*, 100 F. Supp. 84 (S.D. Cal. 1951), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912

> (1955).[1] Substantial competition is a legal conclusion to be drawn from the evidence. *Naumkeag Theatres Co., v. New England Theatres, Inc.*, 345 F.2d 910 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965).
>
> TMT has presented no evidence controverting that of the defendants to show that the theatres were not in substantial competition. The Court concludes that TMT and the Galleria were in substantial competition and that the Galleria's clearances were reasonable.

(*Id.* at B6-B7.)

The Ninth Circuit affirmed the district court's decision. Unlike the district court, which engaged *sub rosa* in a rule of reason balancing test, the Ninth Circuit, citing *Case ıde Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983), *explicitly acknowledged* that in a rule of reason case "[d]etermining whether a particular restraint is reasonable requires a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'"(Appendix A at A8.) The Ninth Circuit found that the positive effects on competition of the Galleria's clearance over TMT outweighed the negative effects because: (1) The Galleria's clearance promoted interbrand competition by forcing TMT to find alternative subrun movies to exhibit and promote; (2) the clearance protected the Galleria by ensuring that its box office revenues would not be diminished by competition from TMT; and (3) the clearance protected

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[1]The district court's citation is incorrect. The case the district court intended to cite is *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied*, 345 U.S. 964 (1953).

the distributors' interest in maximizing their income from licensing exhibition rights to their films. (*Id.* at A9-A10.)

C. Factual Issues Were Raised Concerning the Clearance's Anticompetitive Impact.

As the Ninth Circuit has said:

> Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The facts must be viewed and inferences must be drawn in the manner most favorable to the non-moving party.

Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983); *Fruehauf Corp. v. Royal Exchange Assurance of America, Inc.*, 704 F.2d 1168, 1171 (9th Cir. 1983); *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

Summary judgment is not to be granted where contradictory inferences may be drawn from the facts, even if the facts themselves are undisputed. *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985); *cf. International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985). Similarly, "[i]f there is significant probative evidence in the record in support of both parties' contentions, summary judgment will not be proper for either." *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987). As the court observed in *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Securities Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985):

> Summary judgment is not to be granted merely because the moving party appears likely, or even very likely, to prevail at trial; the procedure is reserved for cases where the material facts are so clear that a *trial would be an empty exercise in formalism.*

(Emphasis added.)

As the Ninth Circuit has repeatedly stressed, in antitrust cases the general standards for summary judgment "are applied even more stringently and summary judgments granted more sparingly." *Beltz Travel Service, Inc. v. International Air Transport Association*, 620 F.2d 1360, 1364 (9th Cir. 1980); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1207-08 (9th Cir. 1982); *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 280 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977). This policy has developed because antitrust cases "usually involve extensive factual determinations." *Solinger v. A&M Records, Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied sub nom. Motown Record Corp. v. Solinger*, 441 U.S. 908 (1979).

These general strictures are particularly applicable to the instant case. The antitrust legality of a clearance depends solely on its reasonableness under a rule of reason analysis. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 144-48, 68 S. Ct. 915, 923-25 (1948). Over the years the meaning of the term "clearance" has changed substantially. At the time of the Supreme Court's seminal decision in *Paramount Pictures*, "clearance" referred to the interval between a film's "first-run" and its subsequent run. Today, however, clearances give first-run theaters the exclusive right to exhibit a film in a particular area or zone in order to protect the theater's box office revenues from the loss that might

be incurred if the film were exhibited simultaneously by other first-run theaters with which it is in direct and substantial competition. Unlike this usual situation, however, in the instant case TMT was a subrun theater and the Galleria was a first-run theater. Thus the issue raised below—the reasonableness of a first-run theater's clearance over a subrun theater with which it does not directly compete—is quite different from that typically presented in antitrust cases involving clearances.

As the Supreme Court stated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S. Ct. 1355, 1365 (1978), "the inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." The Ninth Circuit has stated that rule of reason analysis requires a detailed investigation of the involved industry's structure and a balancing of the challenged restraint's pro- and anticompetitive effects. *Cascade Cabinet*, 710 F.2d at 1373. "[T]he primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

Rule of reason analysis is an intensely factual inquiry: it "requires the *factfinder* to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S. Ct. 2466, 2472 (1982) (emphasis added); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S. Ct., 2549, 2557 (1977); *Cascade Cabinet*, 710 F.2d at 1370. Finally, in determining a restraint's legality the availability of alternatives that would have

a less restrictive impact on competition is a factor that must be considered. *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1396 (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

As with any other restraint on competition subject to the rule of reason, a clearance's reasonableness "is a paradigm fact question." *Betaseed*, 681 F.2d at 1228 29 (citations omitted). Indeed the Ninth Circuit has strongly suggested that the reasonableness of a particular clearance can be determined only by a jury. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 996-97 (9th Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 876 (1987). *See also Quad Cinema Corp. v. Twentieth Century-Fox Film Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65, 381, at 70, 267, 70,272 (S.D.N.Y. 1983). As the Ninth Circuit has stated in *R.C. Dick*, 827 F.2d at 419, a flexible approach must be taken in determining whether a conspiracy has had a substantial effect on competition.

In the instant case summary judgment was particularly inappropriate. The Galleria's decision to lift its clearance over Mann's Valley West gives rise to more than an inference—it indeed is probative evidence—that its clearance over TMT was an unreasonable restraint of trade that had a significant anticompetitive effect. A jury could have found that the day and date exhibitions at the MVW and the Galleria established that the clearance agreement between Pacific and the defendant distributors *vis-a-vis* the *less competitive* TMT was unreasonable because it restricted competition and eliminated consumer choice.

a. The Clearance Adversely Affected Both Consumer Choice and Price Competition.

As the Supreme Court stated in *Paramount Pictures*, 334 U.S. at 145, 68 S. Ct. at 923, the character of the theaters involved is a key factor to be considered in determining a clearance's reasonableness. While it was in existence, TMT offered filmgoers a choice. Those eager to view a newly released film in more luxurious surroundings could pay a higher price and see the film at the Galleria. But, on the other hand, TMT offered the same film at a lower price to moviegoers willing to defer seeing the film until it moved over to TMT after completing its Woodland Hills first-run.

Consumer choice is, as the Ninth Circuit has said, the hallmark of competition. *R.C. Dick*, 827 F.2d at 421. The Galleria's clearance over TMT eliminated consumer choice because moviegoers were prevented from seeing a film at TMT after it had concluded its Woodland Hills first-run; they could then only see the film at the Galleria.

In weighing the anticompetitive effect of the Galleria's clearance, both the district court and the Ninth Circuit failed to consider fully the geography and demographics of the San Fernando Valley. Below, respondents admitted that the Galleria drew patrons from throughout the valley. (CR 85:8.) If so, then while exhibiting the same films day and date, the Galleria and the Woodland Hills theaters were in "substantial competition" for patrons. The Galleria, however, did *not* clear the Woodland Hills theaters. The question therefore arises: If the Galleria could compete on a first-run day and date basis with the Woodland Hills theaters, what procompetitive factors justified its refusal to play day and date with TMT's subrun (*ie.*, TMT's exhibition of

films that had completed their Woodland Hills first-run)? Neither the district court nor the Ninth Circuit considered this question. This is an issue that properly ought to have been addressed by a jury which might have concluded on the basis of the facts in evidence that the anticompetitive effects of the Galleria's clearance outweighed any possible procompetitive purposes.

b. The Clearance Was Unreasonably Restrictive As Evidenced by the Galleria's Policy of Playing Day and Date with MVW.

The balancing inquiry conducted by the trial court and the Ninth Circuit was defective in other respects because it gave short shrift to additional facts that would have supported a jury verdict in TMT's favor.

When Mann took over TMT it spent some $658,000 to thoroughly refurbish and modernize the theater. As a result, the old TMT was reborn as MVW—a multiscreen, state-of-the-art cinema fully competitive with the Galleria as a first-run theater. Despite this competition from MVW, the Galleria lifted its clearance and competed with MVW on a day and date basis. Even competing head-to-head, both the Galleria and MVW operated profitably. Notwithstanding this fact, the trial court and Ninth Circuit held that the Galleria's clearance over TMT was competitively justified. In other words, the courts below accepted the Galleria's contention that it was harmed economically by competing against the subrun TMT, notwithstanding its ability to compete successfully day and date against the first-run MVW.

Again, the shortcomings of the decisions below are underscored. A reasonable jury, viewing the same facts,

might well have concluded that, in view of its ability to compete successfully against MVW, the anticompetitive effects of the Galleria's clearance outweighed any procompetitive purposes advanced thereby. From the facts in evidence, a reasonable jury could have inferred that the Galleria's clearance over TMT was excessive. *See Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770, 778 (D.D.C. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959).

Finally, it is clear that in rule of reason cases it is necessary to consider whether the procompetitive objective can be achieved by a means that has a less restrictive impact on competition than the restraint actually used. *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1396; *Betaseed*, 681 F.2d at 1228; *Berkey Photo*, 603 F.2d at 303. Here, there was an obviously less restrictive alternative to the Galleria's blanket clearance over TMT: a discriminating, selective use of clearances for specific films in situations where the particular circumstances would justify the clearance. However, neither the district court nor the Ninth Circuit considered the availability of a less restrictive alternative.

CONCLUSION

The standards that govern the granting of summary judgment in antitrust cases are unclear and inconsistently applied. Courts should be especially reluctant to grant summary judgment in rule of reason antitrust cases. The balancing of a challenged restraint's procompetitive and anticompetitive effects is a factual inquiry within a jury's particular sphere of competence.

The decisions below suggest why this Court should consider providing additional guidance to the lower federal courts on the standard for granting summary judgment in antitrust cases. In theory, the decisions

below reflect the courts' determinations that there was not a single fact in the record that could possibly support a jury finding that the Galleria's clearance over TMT was unreasonable as to its scope or duration. The record does not sustain such a determination. On the contrary, a number of material facts in the record, and the reasonable inferences drawn therefrom, would have supported a jury verdict in TMT's favor. It is clear, then, that the decisions below were not based on the proper application of Rule 56. Rather, they reflect *not* an absence of genuine issues of material fact but instead the decisions of the courts below to take out of the jury's hands—and place into their own—the fact-based balancing inquiry mandated by the rule of reason. Given the important public policy goals encompassed in the Sherman Act and the Seventh Amendment, this Court cannot have intended that *Matsushita* and *Celotex* be interpreted by the lower federal courts in such a way as to curtail jury trials in rule of reason antitrust cases. Simply put, juries, not judges, are assigned the task of undertaking the rule of reason's balancing test—a point ignored by the courts below.

Today, there is a vital need for this Court to reaffirm this principle. There is a clear trend toward narrowing the category of restraints deemed *per se* violative of the antitrust laws. *Cf. F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 2017-18 (1986); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S. Ct. 1551 (1979); *R.C. Dick*, 827 F.2d at 414-15; *Ron Tonkin*, 637 F.2d at 1381-88. As the *per se* rule's applicability is constricted, it is obvious that an increasing number of economic restraints will be subjected to rule of reason analysis. The inexorable logic of an enhanced role for rule of reason analysis is a greater reluctance to dispose of antitrust

cases on summary judgment. Greater reliance on fact-based rule of reason analysis necessarily elevates the importance of juries as fact-finders in antitrust cases. In policy terms there is a clear trade-off: narrowing the scope of the *per se* rule in favor of extending the rule of reason means that federal courts must act more cautiously than ever before in granting summary judgment in antitrust cases.

For all the foregoing reasons, petitioner TMT respectfully requests that the instant petition be granted.

Dated: December 28, 1987

Respectfully submitted,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
CHRISTOPHER LAYNE

611 West Sixth Street
28th Floor
Los Angeles, California 90017
Telephone: (213) 622-4222

By: _____
MAXWELL M. BLECHER

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THEEE MOVIES OF TARZANA,
Plaintiff-Appellant,

v.

PACIFIC THEATRES, INC., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORP., TWENTIETH CENTURY FOX FILM CORP., UNIVERSAL FILM EXCHANGES, INC., WARNER BROTHERS DISTRIBUTING CORP., MGM/UA ENTERTAINMENT CO.,
Defendants-Appellees.

No. 86-6211
D.C. No. 84-4890
OPINION

Argued and Submitted
August 6, 1987—Pasadena, California

Filed September 28, 1987

Before: Cynthia Holcomb Hall and Edward Leavy, Circuit Judges, and Robert P. Aguilar,* District Judge.

Opinion by Judge Leavy

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding

*Honorable Robert P. Aguilar, United States District Judge, Northern District of California, sitting by designation.

SUMMARY

Antitrust

Appeal from judgment. Affirmed.

Appellant Theee Movies of Tarzana (TMT) operated a "subrun" movie theater in Tarzana. TMT was not a first run quality theater. Most of the subrun movies shown by TMT had their first run in Woodland Hills. Only a few first run theaters existed in the San Fernando Valley. Appellee Pacific opened the first run quality Galleria Theater, located near TMT's theater. Soon after it opened, Pacific began requesting clearances over TMT for all first run movies shown at the Galleria. Due to the Galleria's clearances, a time period existed between the end of a first run at a Woodland Hills theater and its end at the Galleria when TMT was prevented from showing the particular film. TMT contends that because of the Galleria's extended clearances, its ability to obtain subrun movies was crippled and led to its deteriorating financial situation. Allegedly it cause TMT to sell to Mann Theaters (Mann). Mann remodeled the theater to first run quality. The Galleria stopped requesting clearances over Mann's remodeled theater. TMT claims this is evidence that the Galleria's clearances were unreasonable. However, Pacific contends that it reluctantly withdrew its clearance requests, and only on a movie-by-movie basis, under pressure from the distributors who wanted more opportunities for exhibiting first runs.The district court granted summary judgment in favor of Pacific.

[1] The parties do not dispute that the first factor of a cause of action for an unreasonable restraint of trade is met. The parties disagree on whether factors two and three are met. [2] The second factor concerns whether a particular restraint is reasonable. [3] Vertical restraints are reasonable if they are likely to promote interbrand competition without overly

restricting intrabrand competition. The clearances encourage interbrand competition and the reduction in intrabrand competition was minor. [4] The third factor requiring proof is whether the restraint in question injures competition in the relevant market; injury to the plaintiff alone is not sufficient to prove injury to competition. The alleged injury must be caused by a reduction in competition resulting from the restraint. [5] Competition in the Valley has actually been enhanced by the entry of Mann's theater. [6] The injury to TMT was not due to disruption in competition caused by the Galleria's clearances; it was due to TMT's inability or unwillingness to compete. [7] TMT argues that the clearances resemble a horizontal restraint of trade, relying on case law. The relied-upon law is not applicable.

COUNSEL

Maxwell M. Blecher, Los Angeles, California, for the plaintiff-appellant.

Harry B. Swerdlow, Beverly Hills, California, for the defendant-appellee Pacific Theatres, Inc.; Bertrand M. Cooper and Gregory P. Goeckner, Los Angeles, California, for the defendants-appellees Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century Fox, Universal Film Exchange and MGM/UA Entertainment; Richard C. Yarmuth, Seattle, Washington, for the defendant-appellee Warner Brothers Distributing Corp.

OPINION

LEAVY, Circuit Judge:

The appellant, Theee Movies of Tarzana (TMT), is a partnership which owned a six screen movie theater in Tarzana,

California. The appellees are a competing movie exhibitor, Pacific Theatres, Inc. (Pacific), and several movie distributors (the distributors). TMT alleges the appellees violated § 1 of the Sherman Act. 15 U.S.C. § 1 (1987). At issue is the reasonableness of certain "clearances" granted to Pacific by the distributors in movie exhibition licenses.

Movie exhibitors submit bids to movie distributors for the right, or license, to exhibit particular movies. These bids usually include certain proposed terms: the guaranteed minimum the theater will pay the distributor regardless of the movie's success, division of profits between the exhibitor and distributor, the time period the movie will show, and any clearances. Clearances preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid is accepted. Distributors evaluate these terms, and other factors, in determining which theaters they will license to show particular movies.

TMT claims that the distributors and Pacific acted in concert to provide Pacific's Galleria Theater with clearances over TMT's theater, giving the Galleria an unreasonable competitive advantage. TMT alleges the appellees' conduct eliminated price competition in the relevant market and eventually drove TMT out of business.

TMT sold its theater to Mann Theaters, after which Pacific and the distributors abandoned the clearances. TMT contends this demonstrates the clearances were unreasonable. TMT seeks damages for alleged business losses.

The district court granted summary judgment and entered a judgment of dismissal in favor of all the defendants. The district court held that TMT's theater and Pacific's theater were in substantial competition, that the clearances were reasonable, and that TMT had failed to produce evidence of either a conspiracy or an antitrust injury.

FACTS

TMT owned and operated a six screen "subrun" movie theater on Ventura Boulevard in Tarzana, a community in California's San Fernando Valley, from 1972 until fall 1982. A subrun theater exhibits movies subsequent to their first run in a given area.

TMT acknowledges that the physical condition of its theater had deteriorated over the years. The theater also lacked the state of the art projection and sound systems that the first run movie theaters used. TMT's admission prices were about fifty cents less than those charged by first run theaters.

Most of the subrun movies shown by TMT had their first run at one of three theaters in Woodland Hills, a community, like Tarzana, located in the western portion of the San Fernando Valley. Until the late 1970's, only these few first run theaters existed in the Valley. Then, motion picture distribution patterns began to change nationwide. Due to the emergence of home video cassette recorders and cable television, distributors released movies simultaneously to increasing numbers of first run theaters, to enhance their chances of recouping their investment during the shorter theater release periods. Promotional costs escalated, similarly necessitating wider first run releases. These nationwide trends were accelerated in the Valley by the area's growing population.

In December 1980, Pacific opened the Galleria Theater in Sherman Oaks. The Galleria is also located on Ventura Boulevard, 4.4 miles east of TMT's theater. The Galleria is approximately a thirteen minute drive from TMT's theater. The Galleria was new, clean, and comfortable; offered first run movies; and had state of the art projection and sound systems.

Soon after the Galleria opened, Pacific began requesting clearances over TMT for all first run movies shown at the

Galleria. Since the Woodland Hills first run theaters also historically requested and received clearances over TMT on first run movies, Pacific's request would normally not have had any additional effect on TMT's ability to obtain subrun movies. However, the Galleria exhibited its first run movies for a longer time period than did the Woodland Hills first run theaters. Thus, due to the Galleria's clearances, a time period existed between the end of a first run at a Woodland Hills theater and its end at the Galleria when TMT was prevented from showing the particular film. However, these movies were available to other subrun theaters in Woodland Hills over which the Galleria apparently did not have clearances.

According to various evidence, Galleria first runs lasted from one to five weeks longer than the Woodland Hills first runs. The parties dispute how many films were affected, with allegations ranging from two to thirteen films over an eighteen month period.

TMT contends that because of the Galleria's extended clearances, its ability to obtain subrun movies was "crippled" and its financial situation, previously healthy, began to deteriorate. This allegedly caused TMT to sell its assets to Mann Theaters (Mann) at the "distress" price of $1.4 million in October 1982.

Mann spent $658,000 remodeling and upgrading the theater to first run quality and renamed it Mann's Valley West (MVW). It installed new projection and sound equipment, and began aggressively bidding for first run movies. It took approximately nine months for movie distributors to license regularly Mann to exhibit first runs. MVW charges first run movie prices.

In June 1984, the Galleria stopped requesting clearances over MVW. TMT claims this is evidence that the Galleria's clearances over TMT were unreasonable. However, Pacific contends that it reluctantly withdrew its clearance requests,

and only on a movie-by-movie basis, under pressure from the distributors who wanted more opportunities for exhibiting first runs.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987).

Summary judgment is disfavored in complex antitrust litigation if extensive factual determinations must be made concerning intent and motive. *Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982). However, it is appropriate in "the absence of any significant probative evidence tending to support the complaint." *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 871 (9th Cir. 1986). Then it can be applied "in the twinkling of an eye." *Barry*, 805 F.2d at 871 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 n.39 (1984)).

DISCUSSION

Clearances are vertical non-price restraints of trade. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 144-46 (1948); *Ralph C. Wilson Indus. Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986). Vertical non-price restraints of trade are evaluated under the rule of reason. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). The district court properly analyzed the clearances under the rule of reason.

[1] To establish a cause of action for an unreasonable restraint of trade under the rule of reason, the plaintiff must show: "(1) An agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes

injury to competition." *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983). The parties do not dispute that the first factor is met; the clearances are agreements between Pacific and each distributor. However, the parties do disagree on whether factors two and three are met.

A. *Reasonableness of Restraint*

[2] Determining whether a particular restraint is reasonable requires a " 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition'." *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983)). As acknowledged by courts over the years, "the whole system of runs and clearances . . . purposely, and legitimately, discriminates between competing exhibitors." *Naumkeag Theatres Co., Inc. v. New England Theatres, Inc.*, 345 F.2d 910, 912 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); *see also Paramount Pictures*, 334 U.S. at 145-46.

[3] Vertical restraints are reasonable if they are likely to promote interbrand competition without overly restricting intrabrand competition. *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1136-37 (9th Cir. 1982). The Galleria's clearances reduced intrabrand competition by preventing TMT from showing first run movies simultaneously with the Galleria. However, they also encouraged interbrand competition by forcing TMT to find alternative subrun movies to exhibit and to promote. Moreover, the reduction in intrabrand competition was minor. First run movies still playing at the Galleria were shown as subruns at other Valley theaters over which the Galleria did not have clearances. The distributors did not refuse to deal with TMT; they simply offered the Galleria first run movies a few weeks later than TMT desired. Movies not playing at the Galleria

were not affected: TMT could exhibit them as always. The clearances were a sound business practice for Pacific and the distributors.

Courts have found clearances in particular to be reasonable restraints of trade under certain conditions: when the theaters are in substantial competition, and the clearances are used to assure the exhibitor that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor's expected income will be greatly diminished. *Paramount Pictures*, 334 U.S. at 145-46.

The district court properly found that TMT's theater and the Galleria were in substantial competition. The theaters were located on the same major thoroughfare only a short distance apart, no barriers prevented patrons from driving between the theaters, TMT occasionally bid on first runs, TMT acknowledged it was substantially competitive with Woodland Hills theaters located farther away than the Galleria, TMT's former owner and film buyer admitted several times that they considered the two theaters to be in substantial competition, the Galleria is located in a regional shopping center which draws patrons from throughout the Valley, and both advertised throughout the Valley.

Because the two theaters were in substantial competition, Pacific was properly concerned that exhibiting first runs at TMT's theater simultaneously with the Galleria would diminish the Galleria's income. Pacific wanted to recoup its investment in the Galleria and advertising, rather than allow TMT's theater to "free ride" on its advertising.

The distributors had a legitimate business interest in the revenue generated by the theaters they licensed, because the distributors were paid, in part, out of each movie's gross profits. *Id.*; *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 488 (5th Cir. 1982). The distributors wished to reach the largest number of viewers with the smallest number

of movie prints, to recoup quickly their own investment. TMT did not offer distributors as much in guaranteed payments and profits as did the first run theaters. The distributors made a sound business judgment that the Galleria would generate more profits for them, and sooner, than would TMT's theater.

We agree with the district court that the clearances were reasonable. The TMT theater and the Galleria were in substantial competition with one another. The clearances promoted interbrand competition without overly restricting intrabrand competition.

B. *Injury to Competition*

[4] An antitrust plaintiff must prove that the restraint in question injures competition in the relevant market; injury to the plaintiff alone is not sufficient to prove injury to competition. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.*, 732 F.2d 1403, 1408 (9th Cir. 1984). "The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*'." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962)). Finally, the alleged injury must be caused by a reduction, rather than an increase, in competition resulting from the restraint. *California Computer Prod., Inc. v. IBM Corp.*, 613 F.2d 727, 732 (9th Cir. 1979).

[5] As the district court found, competition in the Valley has actually been enhanced by the entry of Mann's theater. Now an additional theater shows first run movies, thereby increasing competition among first run theaters. That the Galleria dropped its clearance requests over the MVW theater at the distributors' insistence demonstrates this increased competition, contrary to TMT's assertion that it demonstrates the clearances were unreasonable.

[6] The injury to TMT, loss of its business, was not due to disruption in competition caused by the Galleria's clearances; rather, it was due to TMT's inability or unwillingness to compete. TMT acknowledged its movie bids were lower than the Galleria's. TMT did not make the changes in its theater facility or equipment necessary to compete in the market. Mann recognized the potential in the TMT theater, acquired it, and made the investment necessary to turn it into a competitive movie theater.

We agree with the district court's conclusion that TMT failed to demonstrate injury to competition by the Galleria's clearances over TMT's theater.

C. *Clearances as a Horizontal Restraint of Trade*

[7] In its reply brief, TMT for the first time argues that the clearances resemble a horizontal restraint of trade, relying primarily on *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465 (9th Cir. 1983). Horizontal restraints of trade are generally presumed to be illegal. *Cascade Cabinet*, 710 F.2d at 1370.

TMT contends that "[b]ecause the restraint was initiated by a horizontal competitor of the plaintiff in order to curtail rivalry at the exhibitor level, the restraint is horizontal in nature, not vertical." While TMT believes the rule of reason standard is appropriate, it asserts that because the clearances are allegedly horizontal restraints, "a presumption of illegality exists."

Zidell is not applicable. The *Zidell* court held that "if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws." 719 F.2d at 1469. Here, no evidence exists, nor does TMT allege, that the dis-

tributors withdrew from doing all business with TMT. Business decisions were made on a movie-by-movie and bid-by-bid basis. The distributors simply did not offer TMT two to thirteen movies when TMT wanted them; no evidence suggests TMT did not or could not obtain those movies eventually.

While the effect of the clearances might have harmed the business of a price discounting competitor, Pacific and the distributors had legitimate business reasons for maintaining the clearances and Pacific's higher prices. No evidence supports TMT's contention that concern about TMT's prices motivated the clearances. The Galleria was a higher quality theater than TMT's, requiring more money to maintain, it competed with other first run theaters, necessitating advertising costs, and it invested in state of the art equipment. The distributors decided that for these reasons, the Galleria might attract a larger patronage than TMT's theater, and therefore increase their own revenues. The evidence supports the appellees' position that these were the reasons for the clearances.

CONCLUSION

The clearances were reasonable restraints of trade and the appellant has failed to show an antitrust injury. The district court's decision granting summary judgment in favor of the appellees is affirmed.

AFFIRMED.

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THEEE MOVIES OF TARZANA v. PACIFIC THEATRES, INC.
Cite as 1986-2 Trade Cas. (CCH) ¶ 67,231
(C.D. Cal. 1986)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THEEE MOVIES OF TARZANA, Plaintiff, vs. PACIFIC THEATRES, INC., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROS. DISTRIBUTING CORPORATION, AND MGM/UA ENTERTAINMENT CO., Defendants.	)	No. CV 84-4890-DWN MEMORANDUM GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This is an antitrust action brought by one former motion picture theatre owner against an existing theatre chain and several film distributors for conspiring to drive the former from the industry.

APPENDIX B

FACTS

Plaintiff Theee Movies of Tarzana (hereinafter TMT) is the former proprietor of a theatre consisting of six auditoriums. The TMT threatre used standard projection and sound equipment, not the state-of-the-art 70 mm and Dolby Sound systems utilized by its competitors and successor. The auditoriums were not maintained in top condition as evidenced by the expenditures for renovations by TMT's successor, Mann Theatres.

The TMT theatre was located on Ventura Boulevard on which numerous motion picture theatres were found. Defendant Pacific Theatres' Pacific-4 Galleria theatre (hereinafter Galleria) is located in the Sherman Oaks Galleria Shopping Center also on Ventura Boulevard, about four and one-half miles from the TMT theatre site. Ventura Boulevard is a major thoroughfare transversing the southern portion of the San Fernando Valley. Both the TMT and Galleria theatres are easily accessible to the movie-going public in the surrounding community either by means of nearby freeways, major boulevards or local streets.

Film licensing in relation to the instant action consists of two types of screenings: first run and subsequent run films. The first run is the initial screening of a film in a viewing area. A subsequent run is just that; it is a screening subsequent to the first run. First run theatres such as the Galleria, often have top quality facilities, state-of-the-art projection and sound equipment and charge higher prices than do subsequent run theatres.

For the most part, the TMT theatre screened films on their subsequent runs with an occasional less popular first run film. When TMT screened a first run film, however, it charged admission prices equivalent to those

of other first run theatres, rates higher than its normal admission.

Film distributors regularly solicit bids from theatres for the rights to screen films. The Galleria and TMT often bid against one another for the rights to screen certain motion pictures. The facts reveal, however, that TMT's bids for first run films rarely matched those of most first run theatres. Often accompanying successful bids were exclusivity arrangements, known as clearances, which prevented certain competing theatres from simultaneously showing the identical film. It is the reasonableness and, hence, legality of such clearances with which TMT takes issue in this lawsuit.

TMT's troubles developed because the clearances over it from the first run theatres in the Woodland Hills area often did not coincide with those of the Galleria to the east. This prevented TMT from obtaining subsequent run films immediately after their first runs in Woodland Hills or Sherman Oaks as had been the practice prior to the Galleria's opening in 1980. TMT began to suffer at the box office. In 1982 TMT elected to sell its theatre to Mann Theatres for $1.4 million, an allegedly distressed price.

Mann Theatres renovated the theatre, adding 70 mm projection and Dolby Sound equipment, expending approximately $650,000. It also risked $1 million in bidding for first run films. The new theatre, Mann's Valley West Sixplex, was transformed into a successful first run theatre, a risk TMT was never willing to take.

Distributors, seeking wider first run screenings with the advent of cable television and home video cassette recorders, convinced the Galleria to drop its clearance over Mann's Valley West Sixplex in 1984, allowing both theatres to screen the identical films in head-to-head

competition for the first time. Thereafter TMT filed its complaint alleging that the defendants had conspired to drive it from the business by means of the Galleria's clearances.

THE CONTENTIONS OF PARTIES

I

Pacific Theatre seeks summary judgment on the ground that the Galleria's clearances over TMT were reasonable because the theatres were in substantial competition as evidenced by the facts and admissions of TMT's former owner and film buyer. Only after a change in circumstances, the development of cable television and video recorders, did the Galleria reluctantly agree to withdraw its clearance to allow for the wider screening of first run films.

In addition, there was no injury to competition, a prerequisite for an antitrust violation. Mann's Valley West Sixplex's higher bids forced other theatres to increase their bidding, thereby enhancing competition. Furthermore, TMT has no evidence of any unlawful schemes involving clearances employed by the defendants.

II

The distributor defendants' arguments follow those of Pacific Theatres. They contend that there is no evidence of disparate treatment of theatres falling within the area cleared by the Galleria. Nor is there evidence that any conspiracy existed. Rather, the distributors have shown legitimate business reasons for their decisions.

III

TMT contends that the defendants conspired to restrain or eliminate price competition when the

distributors acceded to Pacific Theatres' demands to place their films beyond the reach of TMT by means of clearances. TMT, unable to obtain films because of the Galleria's clearances, was forced to sell its theatre. Futhermore, the issue of substantial competition is one of fact precluding summary judgment. It can be inferred that the distributor defendants were motivated by the prospect of higher film licensing revenues to drive TMT from the scene and promote a higher revenue producing theatre in its stead.

DISCUSSION

The standard for granting summary judgment requires that there be no genuine issue of material fact and that the moving party be entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). A party opposing summary judgment is entitled only to reasonable inferences that may be drawn from the evidence. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir.1985); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981). But when substantial evidence is not produced by the nonmoving party and there is overwhelming evidence favoring summary judgment, it may be unreasonable to draw an inference contrary to movant's interpretation of the facts and, therefore, summary judgment would be appropriate. *Id.*

The recent pronouncement by the Supreme Court in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. ___, 89 L.Ed.2d 538 (1986), held that to survive defendant's motion for summary judgment in an antitrust case, the plaintiff must establish a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused plaintiff to suffer a cognizable injury. This requires the production of two

elements: (1) Plaintiff must show more than a conspiracy; it must show an injury resulting from illegal conduct. (2) The factual issue must be genuine; when defendants meet their burden under Fed. R. Civ. P. 56(c), plaintiff must do more than simply show that there is some metaphysical doubt as to the material facts; the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. 89 L.Ed.2d at 551-52.

I

Under the rule of reason analysis, there must be a determination whether under the circumstances the restrictive practice, Galleria's clearance, imposes an unreasonable restraint on competition. *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366 (9th Cir. 1983); *Quad Cinema Corp. v. Twentieth Century-Fox Film Corp.*, 1983-1 Trade Cas. (CCH) para. 65,381 (S.D. N.Y. May 12, 1983).

To establish a cause of action for unreasonable restraint of trade under the rule of reason analysis, plaintiff must show an agreement intended to harm or unreasonably restrain competition and actual injury to competition resulting therefrom. *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., supra.* Factors examined in determining reasonableness are listed in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). These include: admission prices; size, quality, location and operation of the theatres; rental terms and distributors' revenues; relationship between theatres and distributors; and extent of the theatres competition.

The evidence reveals that the TMT and Galleria theatres were located near enough to one another to draw patrons from the same surrounding communities; no barriers prevented patrons from travelling to one

or to the other; both were located on the same major thoroughfare, Ventura Boulevard; both competed with one another and other theatres for the rights to screen first run films although TMT's bids reflect that it was less intent on showing first run films as were the other first run theatres; occasionally, TMT did screen first run films and charged admission prices equivalent to those charged by the Galleria.

As defendants have shown, the issue of reasonableness and, hence, the legality of the clearances, is premised upon a showing that the theatres were in substantial competition. *United States v. Paramount Pictures, Inc.*, 100 F. Supp. 84 (S.D. Cal. 1951), *aff'd* 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). Substantial competition is a legal conclusion to be drawn from the evidence. *Naumkeag Theatres, Co., Inc. v. New England Theatres, Inc.*, 345 F.2d 910 (1st Cir.), *cert denied*, 382 U.S. 906 (1965).

TMT has presented no evidence controverting that of the defendants to show that the theatres were not in substantial competition. The Court concludes that TMT and the Galleria were in substantial competition and that the Galleria's clearances were reasonable.

II

Under a *per se* analysis, the focus is upon whether there was a concerted effort between a distributor and theatre to engage in anticompetitive activity, namely, a refusal by the distributor to deal with other theatres. *Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d 1465 (9th Cir. 1983); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., supra.*

Defendants have submitted declarations from their employees which categorically deny the existence of any

conspiracy to prevent TMT from obtaining the films it sought. TMT has presented no evidence controverting this testimony. Rather, it relies upon a Fifth Circuit case, *Powers v. Nassau Development Corp.*, 753 F.2d 457 (5th Cir. 1985), for the proposition that summary judgment is not appropriate where a trier of fact could draw an inference of anticompetitive intent. Along this vein, TMT argues that the dealings between Pacific Theatres and the distributor defendants which resulted in the Galleria's clearances might infer a refusal to do business. The distributors continued to do business with TMT, however.

TMT has not presented any evidence that the defendants entered into a conspiracy. The distributor defendants' acts of licensing top films to theatres submitting winning bids are legitimate business decisions. It would be unreasonable to expect the distributors to provide first run films to theatres proffering bids worth less than others. The evidence reveals that TMT did not bid sufficiently for first run films. As the Court stated in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., supra* at 553, *citing Monsanto Co. v. Spray-Rite Service Co.*, 456 U.S. 752, 764 (1984),"conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." TMT's failure to provide any evidence of a conspiracy other than defendants' dealings which can reasonably be interpreted as prudent business decisions, does not infer an antitrust conspiracy. *See also Barnes v. Arden Mayfair, Inc., supra.*

Additionally, there is no evidence to support a conclusion that the defendants intended to discriminate against TMT because of lower admission prices. First, admission prices are but one factor which distributors

may examine when determining whether or not to issue a clearance. *United States v. Paramount Pictures, Inc., supra.* Thus, the *per se* analysis is not applicable to this situation. Second an examination of the theatres' admission prices reveals that the price differential is insignificant. TMT and the Galleria charged the same admission for first run films. Only when TMT screened subsequent run films was there any difference in price, a 12.5% decrease from the $4.00 first run admission to $3.50. TMT was in no way a "cut-rate" theatre.

III

Antitrust laws were enacted to protect competition. *Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc.*, 429 U.S. 477 (1977); *Aydin Corp. v. Loral Corp.*, 718 F.2d 879 (9th Cir. 1983). Actual injury to competition must be shown. *Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc., supra; Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., supra.*

Although a single competitor, TMT, may have been injured by the Galleria's clearances, there is no evidence that competition was harmed. In contrast, competition has been enhanced by the entry into the market of Mann's Valley West Sixplex which has competitively bid for first run films and, consequently, increased distributors' revenues resulting in keener competition among theatres.

CONCLUSION

The Court concludes that TMT and the Galleria were in substantial competition; that the Galleria's clearances were reasonable; and that TMT has failed to produce evidence of a conspiracy in light of defendants' plausible explanation of their business dealings. Furthermore, there has been no showing of a required antitrust injury. Rather, TMT failed to take advantage of its circum-

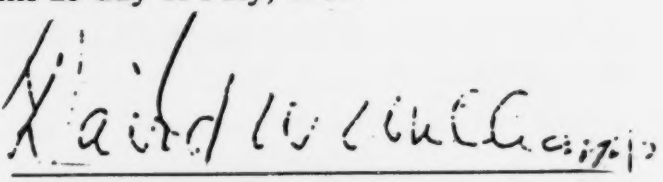
stances and take the risks which Mann Theatres was willing to do and from which it now is reaping benefits.

The Court finds that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law. Pacific Theatres' and the distributor defendants' motions for summary judgment are hereby GRANTED.

The Court adopts this Memorandum as its findings of fact and conclusions of law.

IT IS SO ORDERED.

DATED: This 23 day of July, 1986.



DAVID W. WILLIAMS
Senior U.S. District Judge

PROOF OF SERVICE BY MAIL

State of Calfornia

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 28, 1987, I served the within Petition for A Writ of Certiorari in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Harry B. Swerdlow, Esq.
James L. Seal, Esq.
Joseph L. Golden, Esq.
ROSENFELD, MEYER & SUSMAN
9601 Wilshire Boulevard
Suite 444
Beverly Hills, California 90210

Philip E. Westbrook, Esq.
Bertrand M. Cooper, Esq.
Gregory P. Goeckner, Esq.
O'MELVENY & MYERS
1800 Century Park East
Suite 600
Los Angeles, California 90067

Richard C. Yarmuth, Esq.
Michael D. Helgren, Esq.
CULP, DWYER, GUTERSON & GRADER
2700 One Union Square
Seattle, Washington 98101

Robert J. Rose, Esq.
NUTTER, BIRD, MARELLA, BOXER, WOLPERT & MATZ
10960 Wilshire Boulevard
24th Floor
Los Angeles, California 90024

I declare under penalty of perjury that the above is true and correct.

Executed this 28th day of December, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Theee Movies of Tarzana,
Petitioner,
vs.

Pacific Theatres, Inc., Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Distributing Corporation and MGM/UA Entertainment Co.,
Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

Respondents' Joint Brief In Opposition to Petition for Writ of Certiorari

Bertrand M. Cooper*
Gregory P. Goeckner
O'Melveny & Myers
Suite 1500
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000
Attorneys for Respondents
Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal Film Exchanges, Inc. and MGM/UA Entertainment Co.

**Counsel of Record*

(Additional counsel on reverse side.)

Richard C. Yarmuth*
Culp, Guterson & Grader
Suite 2700
One Union Square
Seattle, Washington 98101
(206) 624-7141
Attorneys for Respondent
Warner Bros. Distributing
Corporation

Harry B. Swerdlow*
James L. Seal
Rosenfeld, Meyer & Susman
Suite 444
9601 Wilshire Boulevard
Beverly Hills, California 90210
(213) 858-7700
Attorneys for Respondent
Pacific Drive-In Theatres Corp.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. PETITIONER ESTABLISHES NO BASIS FOR GRANT OF CERTIORARI 1

II. FACTUAL BACKGROUND 2

III. THERE IS NO BASIS TO REVIEW AGAIN THE STANDARDS FOR SUMMARY JUDGMENT 6

IV. THE CLEARANCES AT ISSUE WERE REASONABLE BECAUSE THE THEATRES WERE IN SUBSTANTIAL COMPETITION 9

A. "Substantial Competition" Is the Legal Standard for Evaluation of Clearances 9

B. Summary Judgment Was Appropriate on the Undisputed Facts 11

V. PETITIONER PRESENTS NO FACTUAL BASIS FOR DISTINGUISHING THIS CASE FROM THE ORDINARY CLEARANCE CASE 13

Page

VI. PETITIONER HAS FAILED TO ESTABLISH ANY HARM TO THE COMPETITIVE PROCESS 15

CONCLUSION 17

APPENDIX A

Rule 28.1 Listing A-1

TABLE OF AUTHORITIES

Page

Cases

United States Supreme Court:

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 106 S.Ct. 2505 (1986) 6-8

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.
429 U.S. 477, 97 S.Ct. 690 (1977) 15

Celotex Corp. v. Catrett
477 U.S. 317, 106 S.Ct. 2548 (1986) 6-8

Continental T.V., Inc. v. GTE Sylvania Inc.
433 U.S. 36, 97 S.Ct. 2549 (1977) ..... *passim*

Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.
475 U.S. 574, 106 S.Ct. 1348 (1986) 6-8

N.C.A.A. v. Board of Regents of the University of Oklahoma
468 U.S. 85, 104 S.Ct. 2948 (1984) 7

United States v. Paramount Pictures, Inc.
334 U.S. 131, 68 S.Ct. 915 (1948) ..... *passim*

Page

Federal Courts of Appeal:

Barry v. Blue Cross of California
805 F.2d 866 (9th Cir. 1986) 8

Continental T.V., Inc. v. GTE Sylvania Inc.
694 F.2d 1132 (9th Cir. 1982) 8

National Basketball Ass'n v. SDC Basketball Club, Inc.
815 F.2d 562 (9th Cir.), *cert. dismissed sub nom.* Los Angeles Memorial Coliseum Comm'n v. National Basketball Ass'n
108 S.Ct. 362 (1987) 8

Naumkeag Theatres Co. v. New England Theatres, Inc.
345 F.2d 910 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965) 10

O.S.C. Corp. v. Apple Computer, Inc.
792 F.2d 1464 (9th Cir. 1986) 8

Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.
794 F.2d 1359 (9th Cir. 1986) 8

R.C. Dick Geothermal Corp. v. Thermogenics, Inc.
827 F.2d 407 (9th Cir. 1987) (opinion withdrawn) 8

Southway Theatres, Inc. v. Georgia Theatre Co.
672 F.2d 485 (5th Cir. 1982) 10

Page

Federal District Courts:

Ayers v. Pastime Amusement Co.
283 F. Supp. 773 (D.S.C. 1968) 10

Broadway & Ninety-Sixth Street Realty Co. v. Loew's, Inc.
21 F.R.D. 347 (S.D.N.Y. (1958) 10

Fanchon & Marco v. Paramount Pictures, Inc.
100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied*, 345 U.S. 964 (1953), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955) 10

Paramount Pictures Theatres Corp. v. Partmar Corp.
97 F. Supp. 552 (S.D. Cal. 1951), *aff'd*, 200 F.2d 561 (9th Cir. 1952), *aff'd*, 347 U.S. 89, *reh'g denied*, 347 U.S. 931 (1954) 10

Quad Cinema Corp. v. Twentieth Century Fox Film Corp.
80 Civil 5650 (S.D.N.Y. April 19, 1984) 11

United States v. Loew's, Inc.
1971 Trade Cas. (CCH) ¶ 73,673, at 90,803 (S.D.N.Y. 1971) 13

Page

Universal Amusements Co., Inc. v. General Cinema Corp. of Texas, Inc., 635 F. Supp. 1505 (S.D. Tex. 1985) 11

Other Authorities:

Statutes

Sherman Act, Section 1, 15 U.S.C. Section 1 2

Clayton Act, Section 4, 15 U.S.C. Section 15 2

Court Rules

Federal Rule of Civil Procedure 56(c) 3, 6

United States Supreme Court Rule 17.1 1

United States Supreme Court Rule 28.1 3

No. 87-1089

IN THE

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Theee Movies Of Tarzana,
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Respondents' Joint Brief In Opposition to Petition for Writ of Certiorari

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ARGUMENT

I. PETITIONER ESTABLISHES NO BASIS FOR GRANT OF CERTIORARI.

Supreme Court Rule 17.1 makes clear that this Court will grant review on writ of certiorari only if: (1) the decision below conflicts with decisions of other federal courts of appeal; (2) the decision below resolved an important question of law not yet settled by this Court; or, (3) the decision below conflicts with a prior decision of this Court. None of those criteria is met here.

The question of law presented by this petition — the standard for summary judgment — has been reviewed by this Court on several occasions in recent years. Nothing

about this petition suggests any basis for further examination of the issue. The Circuits do not differ in their interpretation of this Court's decisions, and petitioner does not suggest that the Ninth Circuit misapplied those standards here.

More importantly, petitioner raises no objection to the substantive standard applied below — "substantial competition" — to evaluate clearances under the Sherman Act's rule of reason; and, petitioner suggests no genuine dispute about any fact material to application of that standard here.

Indeed, petitioner asks this Court to review nothing more than a lower court's routine application of the summary judgment procedure to undisputed facts in an area of well-established substantive law. Nothing distinguishes the decision below from the thousands of other cases decided annually in the lower courts involving issues of antitrust or summary judgment. Thus, respondents believe the petition should be summarily denied.

II. FACTUAL BACKGROUND.

This action was commenced in July 1984; petitioner alleges violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, and jurisdiction under 15 U.S.C. Section 15. At issue are the reasonableness of certain "clearances" assertedly granted in motion picture exhibition licenses during 1980-82 to respondent Pacific Drive-In Theatres Corp. ("Pacific"), an exhibitor of motion pictures, by respondents Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Distributing Corporation and MGM/UA Entertainment

Co.,[1] each of which is a distributor of motion pictures (collectively "distributors"). After the completion of extensive discovery, Pacific and the distributors filed separate motions in the District Court for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c), based on undisputed evidence that: (1) Pacific's Galleria theatre was in "substantial competition" with petitioner's Tarzana theatre, making the clearances reasonable; and, (2) the challenged clearances had no adverse effect on competition. The District Court granted the motions and entered judgment of dismissal in favor of all defendants. 1986-2 Trade Cas. (CCH) ¶ 67,231, at 61,170 (C.D. Cal. 1986). On appeal, reviewing the summary judgments *de novo*, the Ninth Circuit Court of Appeals unanimously affirmed. 828 F.2d 1395 (9th Cir. 1987). This petition follows that affirmance.

Petitioner claims that the Galleria's clearances over it were unlawful. When a distributor grants a clearance requested by an exhibitor as part of a motion picture license, it agrees not to license the same picture to play "day and date" (*i.e.*, simultaneously) at a cleared theatre. (CR 108:3.)[2] Clearances are a form of vertical territorial restriction which apply to the distribution and exhibition of motion pictures. Vertical territorial restraints are lawful under the Sherman Act's rule of reason if their effect is to

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[1] A separate list of respondents' parent, subsidiary and affiliated corporations, as required by Supreme Court Rule 28.1, is attached as Appendix A to this brief.

[2] Citations to the District Court record are in the following form: (CR x:y), in which "x" is the number of the document on the District Court's docket sheet and "y" is the consecutive page number therein supporting the material in this Brief. Citations to briefs filed in the Ninth Circuit are to the abbreviated title of the document, *i.e.* "Petitioner's Opening Brief on Appeal, at x." Citations to the present Petition for Writ of Certiorari are to "Petition, at x."

promote interbrand competition without unduly restraining intrabrand competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977).

Clearances substantially enhance interbrand competition — between showings of different motion pictures[3] — among motion picture exhibitors. A clearance protects the licensed theatre's box office gross potential from diminution by nearby theatres showing the same picture. Over the longer term, clearances also encourage exhibitors to make substantial investments in quality state-of-the-art theatres and to promote exhibition of licensed motion pictures to the public, without fear that competing theatres will act as "free riders," reaping the benefits without making similar substantial expenditures of their own funds. By increasing such interbrand competition, clearances also benefit theatre patrons, providing them with a greater choice of motion pictures to see.

In contrast, individual clearances minimally restrict intrabrand competition — competition between exhibitors showing the same motion picture — because they affect only specified nearby "cleared" theatres, limit those theatres' ability to exhibit only that single motion picture, and last only the few weeks that the picture is shown at the

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[3] As used herein, "interbrand" competition refers to the simultaneous showing at two theatres of two different motion pictures — *e.g.*, "SUPERMAN II" and "THE GREAT MUPPET CAPER" — which compete for the same patrons; theatres in "intrabrand" competition simultaneously show the same picture — *e.g.*, "ROCKY III" — and compete for the same patrons. Because distributors often have multiple pictures licensed for exhibition at the same time, "interbrand" competition between showings of different pictures may encompass competition for theatre patrons between different pictures licensed by the same distributor. Thus, the "intrabrand" competition restrained by clearances is much more limited than is the case with the typical "intrabrand" restraint, which applies to an entire product line.

licensed theatre. Clearances are much less restrictive than the normal intrabrand vertical territorial restraint, which applies to a manufacturer's entire product line, gives the dealer exclusive rights to a broad territory and often lasts several years.

In light of these considerations, clearances long have been deemed valid under the Sherman Act's rule of reason, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 147, 68 S.Ct. 915 (1948), if the theatres are in "substantial competition" for patrons, *i.e.*, if they each draw substantial portions of their patronage from the same area. The clearances at issue here clearly were valid under the criteria of *Sylvania* and *Paramount*. They encouraged Pacific to build and operate its expensive state-of-the-art Galleria Theatre in Sherman Oaks, offering both distributors and theatre patrons additional motion picture exhibition choices in the area. However, their restrictive effect was only on intrabrand competition, preventing petitioner's theatre from simultaneously showing the same motion picture as the Galleria and thereby depriving petitioner of a potential "free ride" on the Galleria's investment and advertising. In effect, petitioner complains of nothing more than being deprived of this "free ride," and thereby being required to exhibit another motion picture, *i.e.* petitioner complains of being required to engage in interbrand competition with the Galleria.

In addition, the clearance at issue had an unusually limited effect on intrabrand competition. Petitioner's theatre routinely faced a simultaneous, and admittedly valid, clearance from one of three theatres in Woodland Hills, California. Petition, at 4. Thus, the Galleria's clearance affected petitioner only when the Galleria held a first run picture longer than the corresponding Woodland Hills theatre showing the picture. Petition, at 5. This happened only rarely. Even according to petitioner, it occurred no

more than thirteen times out of the hundreds of motion pictures exhibited in the area over an eighteen month period. It would be difficult to describe a less restrictive impact on intrabrand competition. Petitioner's Opening Brief on Appeal, at 9.[4] Moreover, the effect on petitioner itself was *de minimis*. On every such occasion, petitioner was able to exhibit some other subrun picture, either from the same or another distributor. (CR 89:69.)

Because petitioner admits its theatre and the Galleria were in substantial competition, (CR 89:30-31, 76), the pro-competitive effects of these clearances plainly outweighed their minimal impact on intrabrand competition and the Courts below properly found them to be valid.

III. THERE IS NO BASIS TO REVIEW AGAIN THE STANDARDS FOR SUMMARY JUDGMENT.

Petitioner suggests this Court should examine again the standards for summary judgment under F.R. Civ. P. 56, even though this Court has examined those standards extensively in recent years and devoted three significant decisions in 1986 to the subject. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Those decisions set forth adequate guidelines for the lower courts on the Rule's interpretation and on the importance of summary judgment as a procedure for the orderly conclusion of extended and

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[4] Pacific's analysis indicates an even smaller effect, that the Galleria's clearances delayed petitioner's sub-run licenses on only two occasions, costing t at most $2,281 in box office revenue. Pacific's Opposition Brief on Appeal, at 18-19; (CR 84:24-26; 85:133-34.)

complex litigation. *E.g. Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986) (summary judgment is an "integral part of the Federal Rules" which allows defendants to demonstrate that claims against them "have no factual basis").

Summary judgment is of special significance to dispose of antitrust cases, where the failure to dismiss unfounded claims may directly injure competition, chilling pro-competitive activity and imposing high economic costs on successful competitors. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94, 106 S.Ct. 1348, 1360 (1986). Rule of reason cases are no exception; in appropriate situations, " 'the rule of reason can . . . be applied in the twinkling of an eye.' " *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109 n.39, 104 S.Ct. 2948, 2964-65 n.39 (1984) (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981)). Indeed, with issues of motive and intent absent from the substantive standard for clearances, cases such as this are perfectly suited for summary adjudication.

In the face of these decisions, petitioner does not argue that this Court has given insufficient attention in recent years to summary judgment standards or that the Ninth Circuit *misapplied* those standards in this case. Rather, petitioner implicitly recognizes that the summary judgment standard it advocates, Petitioner's Opening Brief on Appeal, at 27; *cf.* Petition, at 21, would require reversal of *Anderson*, *Matsushita* and *Celotex*. (In urging the Ninth Circuit to reverse this summary judgment, petitioner did not even mention *Anderson* or *Matsushita* and included only one passing reference to *Celotex* in a footnote. Petitioner's Opening Brief on Appeal, at 17 n.2.)

Petitioner also suggests confusion and inconsistency in the Ninth Circuit after *Anderson*, *Celotex* and *Matsushita*.

Of course, such an "intra-circuit conflict" is not an appropriate matter for review by certiorari, but should have been resolved by petition for rehearing *en banc* to the Court of Appeals, a step petitioner never took. In any event, the Ninth Circuit's decisions belie such confusion. The only two[5] Ninth Circuit decisions cited by petitioner which postdate *Anderson, Celotex* and *Matsushita* — *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir.), *cert. dismissed sub nom. Los Angeles Memorial Coliseum Comm'n v. National Basketball Ass'n*, 108 S.Ct. 362 (1987) and *Barry v. Blue Cross of California*, 805 F.2d 866 (9th Cir. 1986) — are consistent with those decisions of this Court. Nor has the Ninth Circuit had any difficulty applying the rule of reason in Sherman Act cases on motions for summary judgment, *Barry v. Blue Cross of California*, 805 F.2d 866, 871 (9th Cir. 1986); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469-70 (9th Cir. 1986), including cases challenging vertical territorial restraints, *Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359 (9th Cir. 1986); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1135-36 (9th Cir. 1982).

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[5] The current status of the Ninth Circuit's decision in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407 (9th Cir. 1987), cited repeatedly by petitioner, is uncertain. That decision was withdrawn from publication in the bound reporter, pending the Circuit's decision on a motion for rehearing. Respondents are informed that the original panel of the Ninth Circuit recently has re-affirmed that decision, but that a petition for rehearing *en banc* now is pending before the entire court. The opinion apparently has not yet been re-published. In any event, the opinion supports respondents' position here, because the Ninth Circuit in *R.C. Dick* affirmed a grant of summary judgment dismissing Sherman Act claims under the rule of reason.

IV. THE CLEARANCES AT ISSUE WERE REASONABLE BECAUSE THE THEATRES WERE IN SUBSTANTIAL COMPETITION.

A. "Substantial Competition" Is the Legal Standard for Evaluation of Clearances.

Petitioner makes little mention of substantial competition, the substantive standard for evaluation of clearances. That standard is settled by two decisions of this Court: *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915 (1948).

In *Sylvania*, this Court recognized that vertical territorial restraints (such as clearances), as restrictions on intrabrand competition, actually promote interbrand competition by protecting the selected retailer from the "free rider" effect, thereby making the brand's product line — heavily supported by that retailer — more competitive with other brands in the market. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55, 97 S.Ct. 2549, 2560 (1977). Vertical intrabrand territorial restrictions are lawful within the limits of the rule of reason because "[i]nterbrand competition . . . is the primary concern of antitrust law," *id.* 433 U.S. at 52 n.19. Thus, *Sylvania* makes clear that a finding of reasonableness is the only possible outcome where, as here, the restraint in question balances a significant enhancement to interbrand competition against a minor diminution of intrabrand competition.

Consistent with the later analysis in *Sylvania*, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 147, 68 S.Ct. 915 (1948), this Court approved clearances over theatres in "substantial competition" for patrons. The substantial competition standard is justified by the same

concerns over the "free rider" effect — in the context of motion picture exhibition — and the same interest in promoting interbrand competition among different pictures which justify vertical territorial restraints generally. As this Court agreed forty years ago in *U.S. v. Paramount*, the pro-competitive "justification [for clearances] was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film . . . at the same time [as the licensed exhibitor] . . . [which would cause] the exhibitor's expected income from the run . . . [to] be greatly diminished." *Id.* 334 U.S. at 145.[6]

Since 1948, the *U.S. v. Paramount* standard has withstood the test of time, having been examined and consistently applied by the lower courts. *E.g. Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 913 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); *Ayers v. Pastime Amusement Co.*, 283 F.Supp. 773, 786 (D.S.C. 1968); *Broadway & Ninety-Sixth Street Realty Co. v. Loew's, Inc.*, 21 F.R.D. 347, 355 (S.D.N.Y. 1958); *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F.Supp. 84, 90-91 (S.D. Cal. 1951), *cert. denied*, 345 U.S. 964 (1953), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Paramount Pictures Theatres Corp. v. Partmar Corp.*, 97 F. Supp. 552, 558 (S.D. Cal. 1951), *aff'd*, 200 F.2d 561 (9th Cir. 1952), *aff'd*, 347 U.S. 89, *reh'g denied*, 347 U.S. 931 (1954). Following the *Sylvania* decision, substantial competition has remained a viable standard. *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 504 (5th

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[6] Clearances have never been held unlawful *per se*. *Cf. United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145, 68 S.Ct. 915, 923 (1948). Thus, petitioner's suggestion that the reclassification of certain formerly *per se* unlawful restraints to analysis under the rule of reason necessarily cautions courts against the grant of summary judgment, Petition, at 21-22, is inapposite here.

Cir. 1982); *Universal Amusements Co., Inc. v. General Cinema Corp. of Texas, Inc.*, 635 F. Supp. 1505, 1524 (S.D. Tex. 1985); Charge to Jury and Special Interrogatories to Jury at 26-28, *Quad Cinema Corp. v. Twentieth Century Fox Film Corp.*, 80 Civil 5650 (S.D.N.Y. April 19, 1984), attached as (CR 117:25-31).

B. Summary Judgment Was Appropriate on the Undisputed Facts.

Based on this well-established substantive standard, the lower courts properly granted respondents' motions for summary judgment. Because the issue here was reasonableness under the rule of reason, to defeat summary judgment petitioner had to demonstrate its ability to prove the *unreasonableness* of the challenged practice. At most, petitioner demonstrated only a fatal void between its pleadings and the testimony and other evidence provided by its own witnesses.

Petitioner was unable to show any disputed material facts negating the existence of substantial competition between its theatre and the Galleria. To the contrary, during depositions, petitioner's representatives repeatedly admitted the existence of substantial competition. (CR 89:30-31, 76; 108:12-13.) *See also*, Petitioner's Opening Brief on Appeal, at 21 ("if" the facts are as shown by the undisputed evidence, "it could strongly be presumed that the Galleria and TMT were in substantial competition and the [Galleria's] clearance over [TMT] was, perforce, reasonable").

The factual record leaves little doubt that petitioner's concessions were correct: the theatres were located on the same major thoroughfare, only a short distance apart, Petitioner's Opening Brief on Appeal, at 2; (CR 84:6; 90:542-545; 108:15); travel time between them was minimal

and no barriers to access existed, (CR 84:5; 89:12-13, 151-152); residents in the area were highly mobile, (CR 89:25-26, 152-154); residents of Los Angeles normally travel great distances for shopping and entertainment — indeed, Los Angeles, and especially the San Fernando Valley, is known as a "city on wheels," (CR 84:24, 34-73; 89:26); and, petitioner's theatre and the Galleria solicited patrons from broad overlapping areas, (CR 89:51-52). Petitioner also conceded the reasonableness of indistinguishable clearances over its theatre by the first run theatres in Woodland Hills. (CR 84:4; 89:6, 11, 22, 23, 29, 30, 75, 82, 83, 131, 132, 143; 90:542-545.) Finally, petitioner sought the same clearances over the Galleria from distributors (CR 89:84-89, 177-179; 90:526, 540, 541, 546)[7] that it now complains the distributors granted the Galleria over it.

Thus, the lower courts were correct in holding that petitioner's theatre and the Galleria were in substantial competition and that the Galleria's clearances were valid under the rule of reason. Summary judgment for respondents therefore was appropriate.

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[7] The requests by petitioner to clear the Galleria, among other evidence, establish the falsity of petitioner's contention, Petition, at 4, that artificial "zones" divided the San Fernando Valley and controlled the determination of substantial competition among Valley theatres. Obviously, such an artifice, even if true, would have no relevance to analysis of the market conditions on which the antitrust statutes are based. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 46-47, 97 S.Ct. 2549, 2555-56 (1977).

V. PETITIONER PRESENTS NO FACTUAL BASIS FOR DISTINGUISHING THIS CASE FROM THE ORDINARY CLEARANCE CASE.

Petitioner tries to distinguish this clearance case from the usual "substantial competition" decision. First, petitioner contends that the clearances at issue were somehow unusual because they were obtained by a first-run theatre over a sub-run theatre. Petition, at 16. That contention is without merit. First run theatres *always* have cleared sub-run theatres; that has been one of the principal uses of clearances since 1948, when this Court recognized that clearances over sub-run theatres were necessary to protect a first-run theatre's box office gross potential. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145, 68 S.Ct. 915, 923 (1948).

Second, petitioner suggests the Galleria's decision to drop its clearance requests over Mann's Valley West theatre in 1984 as a distinguishing factor. Petition, at 17. This argument fails as a matter of law. Reasonable clearances, as permissible restraints, are not required in every situation where theatres are in substantial competition. *United States v. Loew's, Inc.*, 1971 Trade Cas. (CCH) ¶ 73,673, at 90,803 (S.D.N.Y. 1971). While the Sherman Act clearly distinguishes between reasonable and unreasonable restraints of trade, it does no more than prohibit those restraints found unreasonable. To suggest otherwise would turn the Sherman Act on its head, forcing the courts to begin considering claims based on the *failure* of business competitors to restrain trade. Obviously, petitioner's argument is nonsense.

Petitioner's second suggested distinction also ignores complex changes in market conditions for motion picture distribution. By 1984, those market conditions had changed

both nationwide and in the Valley to such an extent that the Galleria was forced to choose between demanding a clearance over the Valley West and obtaining certain quality first run films. During those years, distributors responded to the rapid emergence of the home VCR and cable and pay television as major market forces, and to rapidly escalating advertising and other promotional costs, by releasing their pictures in increasing numbers of theatres first-run during a shortening theatrical release period. (CR 89:211-212; 90:242-245, 250-251, 311-312, 370-371, 396, 425-426.) In the Valley, the impact of these national trends was accelerated by the area's increasing population base. (CR 89:112-113; 90:323, 406-407.)[8]

To license so many theatres, distributors had to convince exhibitors to drop or limit first-run clearances incompatible with wide distribution patterns. During this period, several traditional clearances in the Valley ended (such as the admittedly valid clearances by the Woodland Hills theatres over the Valley West). (CR 90:261-265, 312, 335-338, 353-357, 369-371, 380-382, 406-407, 432-433, 460-461.) The *last* clearances to end were the Galleria's clearances over the Valley West. Mann Theatres, petitioner's successor, contributed to the impact of these market changes on the

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[8] In concrete terms, the impact of these changing conditions is exemplified by the first run exhibition records for the "STAR TREK" series of motion pictures: the original "STAR TREK" opened first run in December 1979 at 857 screens nationwide and two in the Valley; "STAR TREK II" opened in June 1982 at 1621 screens nationwide, including three in the Valley; but by June 1984 "STAR TREK III" opened on 1966 screens nationwide — at that time the largest first run release ever — including *six theatres* in the Valley. (CR 107:3.) Ultimately, the Galleria's decision to drop its clearances over the Valley West was tied directly to Paramount's need for additional screens in the Valley for "STAR TREK III." (CR 59:14; 90:251-258, 281-288, 422-423.)

Galleria's clearances by investing substantial sums in renovation of the Valley West theatre and by bidding aggressively to exhibit top-quality first-run films, making its theatre an effective first-run competitor. (CR 85:121-23.)

Thus, it is undisputed that the Galleria's 1984 decision to drop its clearances over the Valley West was unrelated to the reasonableness of those clearances. Certainly that change, as the result of changing market conditions several years after the fact, does not support petitioner's suggested inference that the Galleria's clearances were unreasonable in 1980-82.

VI. PETITIONER HAS FAILED TO ESTABLISH ANY HARM TO THE COMPETITIVE PROCESS.

Petitioner simply ignores its failure to establish injury to competition, which was the alternate basis for the decisions below. Because the antitrust laws focus on the preservation of competition, and not on any one competitor, to show a violation of Section 1 petitioner must show both that the Galleria's clearances were unreasonable and that they harmed the competitive process. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697 (1977).

Petitioner's suggested injuries, its supposed losses in box-office revenue and the assertedly forced sale of its assets to Mann Theatres at a "distressed" price, Petitioner's Opening Brief on Appeal, at 3, 8-9; *cf.* Petition, at 7, do not satisfy that requirement of injury to competition. Petitioner's inability to license a few specific sub-run films did not injure competition, because those films were licensed instead to other nearby sub-run theatres, (CR 89:69); at most, the Galleria's clearances rearranged the locations of those few sub-run films.

The sale of TMT's business also did not adversely affect competition. TMT was replaced by Mann's Valley West, a first-class theatre and a vigorous competitor, which bid aggressively for film licenses and eventually became a first-run theatre. Petitioner's Opening Brief on Appeal, at 3, 7, 10, 26-27. If anything, consumer choice increased and competition improved.

Whatever losses were suffered by petitioner resulted not from any injury to competition, but directly from enhanced competition among motion picture exhibitors when the Galleria theatre opened. That petitioner may have failed, by its own unwillingness or inability, to meet the Galleria's increased competition, should be of no concern to the antitrust laws.

CONCLUSION

For the foregoing reasons, respondents submit that this case is not appropriate for discretionary review. The petition for writ of certiorari should be denied.

DATED: January 29, 1988

Respectfully submitted,

BERTRAND M. COOPER
GREGORY P. GOECKNER
O'MELVENY & MYERS

RICHARD YARMUTH
CULP, GUTERSON & GRADER

HARRY B. SWERDLOW
JAMES L. SEAL
ROSENFELD, MEYER & SUSMAN

By: BERTRAND M. COOPER
Counsel of Record

APPENDIX A

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Rule 28.1 Listing

The News Corporation Limited
Satellite Television PLC
William Collins PLC
News International-Hachette LTD.
Trafford Park Printers LTD.
News (UK) LTD.
British Movietonews LTD.
CBS/Fox Video (Holdings) Limited
CBS/Fox Video Limited
UK Film Distributors Limited
Servicios Dist. De Films Ltda. (Brazil)
Col-Fox Servicios Dist. De Films Ltda. (Brazil)
Cinemas Fox-Severiano Ribeiro LTD. (Brazil)
Northern Star Holdings LTD.
Fox/Col Film Distributors Inc. (Panama)
MDF SRL (Venezuela)
Corsair
Grenada Partnership
Fox-UGC S.A. (Belgium)
Columbia-Fox (Denmark)
Columbia-Fox O.E. (Greece)
EPS Entertainment Programming Services LTD. (Canada)
Puerto Rican Film Service (Puerto Rico)
Elle Publishing
Games Management Services
East-West Airlines

Independent Newspapers LTD. (New Zealand)
Wimmera Mail Times PTY LTD.
Advertiser-News Weekend Publishing PTY LTD.
Lotto Management Services PTY LTD.
Computer Power Group Holdings PTY LTD.
Far North Publishing Company PTY LTD.
AYR Newspapers PTY LTD.
Spectak Productions PTY LTD.
Westernport Publishing Co. PTY LTD.
Leader Westernport Printing PTY LTD.
Broadglen Publishing
Victoria Bookshops LTD.
Ansett Transport Industries LTD.
Salmat Direct Marketing PTY LTD.
Automail Holdings PTY LTD.
Consumer Production Marketing Services PTY LTD.
Australian Newsprint Mills Holdings LTD.
Herald Sun Travel PTY LTD.
Post Courier LTD.
Ravette LTD.
Mercury Air Freight Holding LTD.
Advertiser News Weekend Publishing
Company PTY LTD.
Clare Street Investments PTY LTD.
The MacQuarie Library PTY LTD.
Podlich Enterprises PTY LTD.
Anspin PTY LTD.
Quest Media Holdings PTY LTD.
Herald Press PTY LTD.

Provincial Newspapers (QLD) LTD.
Lanmere PTY LTD.
Farmer Publications PTY LTD.
Gulf + Western, Inc.
Warner Communications Inc.
MGM/UA Communications Co.
Turner Broadcasting System, Inc.
The Decurion Corporation
Compare Data Corporation
Cinema Park Drive-In Theatre, Inc.
Ed-Pac Drive-In Theatre Corp.
Film Bond Services, Inc.
MCA Inc.
Two-Beat Music Corp.
Discovision Associates
Saticoy Technology, Inc.
T.E.M. Programs International
Mood Music Company, Inc.
Fontaine Music Corp.
Quantum Media, Inc.
Rancom Films, Inc.
Supreme Music Corporation
Western Costume Co.
MPD Leasehold Corp.
Afram Films, Inc.
American Motion Picture Export Company, Inc.
Motion Picture Export Association of America, Inc.
Motion Picture Export Association of America in Rome
Cinema International Corporation N.V. (Netherlands)

Cineplex Odeon Corporation (Canada)
Alan Hutchison Publishing Company Limited (England)
Eugene Music Limited (England)
Evita Music Limited (England)
Jeeves Music Limited (England)
Radio Music Britain Ltd.
Rawiou Music Limited (England)
Spoone Music Limited (England)
Valley Music Limited (England)
United International Pictures B.V., a Partnership (Netherlands)
Pincus-Gil Music Pty. Limited (Australia)
Spoone Music Pty. Limited (Australia)
Tangerine Music Pty. Limited (Australia)
Regent Investments Pty. Limited (Australia)
Town Cinema Investments Pty. Ltd. (Australia)
The Coca-Cola Company
Coca-Cola Enterprises Inc.
TCC Beverages Limited
Consolidated Coca-Cola Bottling Company
Columbia Pictures Entertainment, Inc.
De Laurentiis Entertainment Group, Inc.
Delphi Film Associates
Delphi Film Associates III
Showscan Film Corporation